

BEFORE THE UNITED STATES DEPARTMENT OF ENERGY

In Re: Notice of Change of Procedures

COMMENTS BY THE CENTER FOR LIQUEFIED NATURAL GAS

The Center for Liquefied Natural Gas (CLNG) respectfully files these comments pursuant to the instructions set forth in the Notice of Change of Procedures published in 79 Federal Register 32261. CLNG requests that these comments be considered for all pending and future proceedings before DOE wherein the various applicants seek authorization from DOE to export liquefied natural gas (LNG) to countries with which the United States has not entered into a free trade agreement providing for the national treatment for the trade in natural gas (non-FTA countries).

Introduction

CLNG is a non-profit trade association whose mission is to promote fact-based discussions on LNG, support public policies that permit LNG exports and imports to be a part of the U.S. energy mix, and to ensure the safe, secure, and environmentally responsible development and operation of LNG facilities in the United States.

CLNG is pleased that DOE recognizes that the Order of Precedence is not workable as evidenced by the language in the notice:

“Further, the proposed procedure will ensure that applications otherwise ready to proceed will not be held back by their position in the order of precedence. While the first grouping of applications in the order of precedence was partially determined by the applicants’ having initiated NEPA review, over time the order of precedence is likely to bear less of a direct relationship to the applicants’ progress in NEPA review. Indeed, it is likely that if DOE were to continue on its current course in the published order of precedence, DOE would act on some applications that have yet to

initiate NEPA review before acting on others that have already finished NEPA review.”<sup>1</sup>

It is the proposed solution to the problem of the order of precedence with which CLNG disagrees: “By removing the intermediate step of conditional decisions and setting the order of DOE decisionmaking based on readiness for final action, DOE will avoid the possibility of delayed action on applications that are otherwise ready to proceed.”<sup>2</sup>

CLNG respectfully asserts that the preferred approach would be to void the Order of Precedence and follow the existing promulgated regulations, and in the absence of a request by a party for additional procedures, issue a final Opinion and Order based upon the official record in close proximity to the closing of the comment period.

#### Legal Authority

The statutory authority governing DOE in its deliberations of the pending export applications is Section 3(a) of the Natural Gas Act, which states:

[N]o person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the [Secretary of Energy] authorizing it to do so. The [Secretary] shall issue such order upon application, unless after opportunity for hearing, [he] finds that the proposed exportation or importation will not be consistent with the public interest. The [Secretary] may by [the Secretary's] order grant such application, in whole or part, with such modification and upon such terms and conditions as the [Secretary] may find necessary or appropriate.<sup>3</sup>

DOE recognizes the Congressional mandate set forth in Section 3 of the Natural Gas Act, which “creates a rebuttable presumption that a proposed export of natural gas is in the public interest. DOE/FE<sup>4</sup> must grant such an application unless opponents of

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<sup>1</sup> 79 Federal Register 32261, at page 32263

<sup>2</sup> Ibid

<sup>3</sup> 15 USC 717b(a)

<sup>4</sup> U.S. Department of Energy, Office of Fossil Energy

the application overcome that presumption by making an affirmative showing of inconsistency with the public interest.”<sup>5</sup> However, Congress left it to DOE to promulgate regulations as to how DOE would address applications for the export of natural gas. DOE promulgated such regulations as set forth in 10 CFR Part 590.

### Regulatory Process

Persons seeking to export LNG from the United States are required to file an application with DOE pursuant to the regulations promulgated by DOE and publicly available in 10 CFR Part 590. The regulation is specific as to when an application must be filed (at least 90 days in advance of the requested action<sup>6</sup>) and what an application must contain, including the following:

1. The project’s scope, including volumes, dates of commencement and completion, and the facility description.
2. The source and security of the natural gas supply to be exported, with a description of the natural gas reserves supporting the project.
3. All participants to the project must be identified.
4. The terms of the transaction that affect the marketability of the gas must be disclosed.
5. The potential environmental impact must be described.<sup>7</sup>

Factual matters set forth in an application are required to be supported by data or documents to the extent practicable. If DOE finds an application incomplete, it may require that additional information be submitted to complete the application.<sup>8</sup>

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<sup>5</sup> *Jordan Cove Energy Project, L.P.*, FE Docket No. 12-32-LNG, DOE/FE Order No. 3413, page 6

<sup>6</sup> 10 CFR Section 590.201(b)

<sup>7</sup> 10 CFR Section 590.202

<sup>8</sup> 10 CFR Section 590.203

Once an application is deemed complete, DOE is required to publish a notice of the application in the Federal Register, providing at least 30 days from the date of publication for persons to file comments, protests or a motion to intervene or notice of intervention.<sup>9</sup>

“Any person wishing to become a party to the proceeding must file a motion to intervene or a notice of intervention, as applicable.<sup>10</sup> The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding.”<sup>11</sup> In order to have the opportunity to request additional procedures as set forth in the following paragraph, a person must be a party to the proceeding.

If DOE grants a person’s motion to intervene, thereby designating that person as a party to the proceeding, there are procedural options that are not available to persons merely filing comments or protests. Section 590.205(b): “The notice of application shall advise the parties of their right to request additional procedures, including the opportunity to file written comments and to request that a conference, oral presentation, or trial-type hearing be convened. Failure to request additional procedures at this time shall be deemed a waiver of any right to additional procedures”<sup>12</sup> if the application is approved.<sup>13</sup>

Once the time set forth in the Federal Register notice has expired, a party in opposition to the application who has not requested any particular “additional

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<sup>9</sup> 10 CFR Section 590.205(a)

<sup>10</sup> State commissions may intervene as a matter of right, thus the proper method is the filing of a notice of intervention. Any other person must seek DOE approval to intervene by the filing of a motion to intervene. 10 CFR Section 590.303.

<sup>11</sup> 77 Federal Register 72840

<sup>12</sup> 10 CFR Section 590.205

<sup>13</sup> The time periods may be extended upon good cause shown, but should be construed narrowly.

procedures” cannot do so later. Indeed, “If no party requests additional procedures, a final Opinion and Order may be issued based upon the official record, including the Application and responses filed by parties pursuant to [the] Notice, in accordance with 10 CFR 590.316.”<sup>14</sup> In essence, the decision will then be based upon the documents filed in the docket. Consequently, upon the expiration of the time period set forth in the notice, no other evidence can be introduced by a party, thus closing the time period to present evidence.

After the expiration of the time period set forth in the Federal Register notice, with no requests for “additional procedures”, and no evidence introduced to overcome the rebuttable presumption, “DOE/FE must grant” the application. With the expiration of the time period set forth in the Federal Register notice, the mere passage of time from that date forward does nothing to add to the evidentiary record upon which DOE must base its decision. Therefore, with the official record set, DOE should not suspend consideration of an application based upon extraneous matters beyond the official record. Neither should DOE be on a continual evidence gathering process beyond the close of the comment period. DOE should proceed to a decision after the expiration of the time period set forth in the Federal Register. This is especially so given the statutory presumption in favor of the application. With the statutory presumption, DOE is not to view the application from a neutral position vis-a-vis other parties, but with a view in favor of the application, nor is there a need for DOE to look for evidence beyond the official record to buttress its decision. In the absence of evidence overcoming the statutory presumption, DOE’s decisions should be made shortly after the close of the comment periods.

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<sup>14</sup> 77 Federal Register 72840

### The Queue:

Effective on December 5, 2012, DOE announced the Order of Precedence (the queue) for processing non-FTA LNG export applications pending before it. On its website, DOE made the following announcement:

“DOE will begin processing all long-term applicants [sic] to export LNG to non-FTA countries in the following order:

- All pending DOE applications where the applicant has received approval (either on or before December 5, 2012) from the Federal Energy Regulatory Commission (FERC) to use the FERC pre-filing process, in the order the DOE application was received.
- Pending DOE applications in which the applicant did not receive approval (either on or before December 5, 2012) from FERC to use the FERC pre-filing process, in the order the DOE application was received.
- Future DOE applications, in the order the DOE applications are received.”

CLNG asserts that the establishment of the queue was a violation of the Administrative Procedures Act, added regulatory burdens not contemplated by the regulations in 10 CFR Part 590, and was applied retroactively for those applications pending on December 5, 2012. It should be rightfully voided.

### The Proposed Procedure

The proposal is for DOE to “act on applications to export liquefied natural gas (LNG) only after the review required by the National Energy Policy Act (NEPA) has been completed, suspending its [DOE’s] practice of issuing conditional decisions prior to final authorization decisions.”<sup>15</sup> CLNG acknowledges that the promulgated regulation

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<sup>15</sup> 79 Federal Register 32261

by which DOE issues conditional orders is permissive in nature.<sup>16</sup> However, a plain reading of 10 CFR Part 590 clearly shows that upon the expiration of the time period set forth in the Federal Register, the application process regarding the commodity is ready for DOE to proceed with a decision on the merits of the pending applications. DOE's regulations do not contemplate predicating when DOE will render a decision based upon when an applicant files with another federal agency.

### CLNG's Concerns

DOE has stated its intention "to suspend its practice of issuing conditional decisions on applications to export LNG from lower-48 states to non-FTA countries prior to completion of NEPA review."<sup>17</sup> (Citation omitted). Conditional decisions serve a broader purpose for the applicant than just the commitment of funds for the NEPA review. Conditional decisions provide the requisite level of regulatory certainty that the export of the commodity will be authorized. Indeed, as noted in the conditional decisions previously issued, the Jordan Cove Energy Project being the most recent, "conditional Order[s] make preliminary findings on all issues except the environmental issues in [the] proceeding[s]."<sup>18</sup> By continuing to delay its decisions on the applications, DOE limits the ability for the applicants to negotiate effectively with customers. A timely decision, even a conditional decision, sends a clear message to the customers that applicants are on track for ultimate operations of the facilities proposed. Conversely, continued delays in issuing decisions cause uncertainty, costing the applicants significant sums of money because of the lost time, either in securing customers or setting definitive construction schedules. In fact, the new procedure requires applicants

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<sup>16</sup> 10 CFR Section 590.402

<sup>17</sup> 79 Federal Register 32261, at page 32263

<sup>18</sup> *Jordan Cove Energy Project, L.P.*, FE Docket No. 12-32-LNG, DOE/FE Order No. 3413, page 14

to incur significant costs to complete the NEPA review without any certainty they will receive a decision from DOE. Furthermore, there is no justification in DOE's promulgated regulations for it to proceed on its determinations based upon how advanced an applicant is with respect to a completely separate application before a completely separate agency. Since DOE can proceed to a decision upon the closing of the comment period in the absence of evidence presented to overcome the statutory presumption, the conditional decision on the export of the commodity can be made well in advance of the completion of the NEPA review.

#### Conclusion

An applicant should have the reasonable expectation that upon completion of the application, its filing with DOE, payment of the filing fee, and the expiration of the comment period as established in the Federal Register notice without evidence being introduced to overcome the statutory presumption, DOE would require nothing more than the official record to render a decision. In other words, an applicant should have the reasonable expectation that DOE would follow its promulgated regulations. DOE should not engage in a perpetual process of gathering information as evidence to use in the various dockets as such information is beyond the reach of, and not disclosed to, the respective parties. Furthermore, an applicant should be able to expect DOE to render its decision within a reasonable time after the closing of the time period set forth in the Federal Register notice. Therefore, CLNG respectfully requests that DOE void the Order of Precedence, not initiate the proposed proceedings, and immediately issue decisions on the applications in which the comment periods have closed.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Bill Cooper". The signature is fluid and cursive, with a horizontal line drawn underneath the name.

Bill Cooper

President

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